

No. 83-1429

Office - Supreme Court, U.S.

FILED

MAY 29 1984

ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALABAMA POWER CO., ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

JOHN A. BRYSON

CATHERINE A. COTTER

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-3217

WILLIAM F. PEDERSEN

CHARLES S. CARTER

Attorneys

Environmental Protection Agency

Washington, D.C. 20460

QUESTION PRESENTED

Whether the court of appeals erred in setting aside regulations promulgated by the Environmental Protection Agency under Section 123 of the Clean Air Act, 42 U.S.C. (Supp. V) 7423, governing the maximum amount of stack height a facility may use as a pollution control technique.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Big Rivers Electric Corp. v. EPA</i> , 523 F.2d 16, cert. denied, 425 U.S. 934	2
<i>INS v. Wang</i> , 450 U.S. 139	8
<i>Kennecott Copper Corp. v. Train</i> , 526 F.2d 1149, cert. denied, 425 U.S. 935	2-3
<i>Natural Resources Defense Council, Inc. v. EPA</i> , 489 F.2d 390, rev'd on other grounds <i>sub nom.</i> <i>Train v. Natural Resources Defense Council, Inc.</i> , 421 U.S. 60	2

Statutes:

Clean Air Act Amendments of 1970, § 110(a) (2) (B), 42 U.S.C. 1857c-5(a) (2) (B)	2
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7401 <i>et seq.</i> :	
§ 123, 42 U.S.C. (Supp. V) 74231, 2, 3, 4, 8, 10, 12	
§ 123(a), 42 U.S.C. (Supp. V) 7423(a)	2, 3
§ 123(c), 42 U.S.C. (Supp. V) 7423(c)	3, 4, 11
§ 169(4), 42 U.S.C. (Supp. V) 7479(4)	4
§ 302(k), 42 U.S.C. (Supp. V) 7602(k)	2

Miscellaneous:

123 Cong. Rec. 27071 (1977)	6
44 Fed. Reg. (1979):	
p. 2608	4
p. 15785	4

IV

Miscellaneous—Continued:

	Page
p. 24329	4
p. 40359	4
45 Fed. Reg. 42279 (1980)	4
46 Fed. Reg. 28650 (1981)	4
47 Fed. Reg. 5864 (1982)	4
H.R. Rep. 95-294, 95th Cong., 1st Sess. (1977)	6, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1429

ALABAMA POWER CO., ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 719 F.2d 436.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. A petition for rehearing was denied on December 13, 1983 (Pet. App. 70a-71a). The petition for a writ of certiorari was filed on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to regulations promulgated by the Environmental Protection Agency (EPA) under Section 123 of the Clean Air Act, 42 U.S.C. (Supp. V) 7423, governing the maximum

amount of stack height that a facility may use as a pollution control technique. There are two basic methods by which a facility can reduce pollution emissions to meet applicable emission limitations. The first is to reduce its total emissions through the use of cleaner fuels or the installation of pollution control equipment. Alternatively, a source can simply increase the dispersion of its emissions in the atmosphere and thereby decrease localized pollution concentrations. This second method is known as a dispersion technique, and includes the use of "tall stacks."¹

Prior to 1970 there were no constraints on the use of stack height and other dispersion techniques. The 1970 Amendments to the Clean Air Act did not explicitly regulate the use of tall stacks. Congress directly addressed the use of dispersion techniques for the first time in the 1977 amendments to the Clean Air Act by enacting Section 123, 42 U.S.C. (Supp. V) 7423.² Under Section 123 a facility may not employ

¹ Other dispersion techniques include devices or processes that increase the temperature or velocity of emissions, thereby pushing them higher into the atmosphere. The court of appeals overturned EPA's regulatory definition of these techniques, but petitioners do not seek review of this aspect of the decision. Pet. App. 50a-57a.

² Congress also made it clear that an emission limitation requires reduction of "the quantity, rate, or concentration" of pollutants, not merely dispersion. Section 302(k), 42 U.S.C. (Supp. V) 7602(k).

Before 1977, the courts of appeals had construed Section 110(a)(2)(B) of the 1970 Act, 42 U.S.C. 1857c-5(a)(2)(B), to preclude the use of dispersion techniques unless other controls were "unachievable or infeasible." *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 410 (5th Cir. 1974), rev'd on other grounds *sub nom. Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); see, e.g., *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16, 20-22 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Kennecott Cop-*

a stack greater than "good engineering practice" (GEP) height, which is defined as follows:

[G]ood engineering practice [height] means * * * the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmosphere downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator [of EPA]).

The Act as amended does not directly prohibit the construction of excessively tall stacks. Instead, it provides that the increased dispersion of pollutants created by such stacks may not be considered when setting an emission limitation for a source.³ As a result, an emission limitation must be sufficiently stringent to protect the national ambient air quality standards as though pollutants were emitted into the air at GEP stack height, even if actual stack height is greater. The Act thereby eliminates the incentive for construction of excessively tall stacks.

The statute does recognize, however, that stacks constructed to GEP height are necessary to avoid harmful local air pollution due to "downwash, eddies and wakes."⁴ Section 123(c) adopts the traditional

per Corp. v. Train, 526 F.2d 1149, 1154-1155 (9th Cir. 1975), cert. denied, 425 U.S. 935 (1976).

³ Section 123(a) states: "The degree of emission limitation required for control of any air pollutant under an applicable implementation plan under this subchapter shall not be affected in any manner by—(1) so much of the stack height of any source as exceeds good engineering practice (as determined under regulations promulgated by the Administrator), or (2) any other dispersion technique." 42 U.S.C. (Supp. V) 7423(a).

⁴ Downwash is caused by buildings or terrain features located upwind of a stack that can disrupt normal airflow,

estimate of GEP height—two and one half times the height of a nearby building or terrain feature—as the presumptive GEP stack height in most instances. 42 U.S.C. (Supp. V) 7423(c). A facility may obtain credit for additional stack height only if it demonstrates that such height is necessary to avoid “excessive” air pollution concentrations. These height limitations apply to all stacks “in existence” on December 31, 1970, the effective date of the 1970 amendments to the Act.⁶

2. Section 123 requires EPA to promulgate regulations defining GEP stack height and identifying other dispersion techniques. EPA first proposed regulations on January 12, 1979. 44 Fed. Reg. 2608. At the request of several commenters, EPA held a public hearing and subsequently provided three additional comment periods. 44 Fed. Reg. 15735 (1979); 44 Fed. Reg. 24329 (1979); 44 Fed. Reg. 40359 (1979). On June 24, 1980 EPA issued an interim stack height policy addressing existing stacks (45 Fed. Reg. 42279) which it subsequently withdrew. 46 Fed. Reg. 28650 (1981). EPA repropoed its regulation on October 7, 1981, and published the final regulations at issue here on February 8, 1982. 47 Fed. Reg. 5864.

The final rules, so far as is relevant here, establish two basic methods of determining GEP stack height.

creating a turbulent “wake” of air filled with circulating eddies. If a stack is located within this wake, the turbulence can pull its emission plume down to ground level, creating localized episodes of high pollutant concentrations.

⁶ There are two “grandfather” clauses in the Act that exempt certain stacks designed or constructed prior to 1975. Sections 123(c) and 169(4), 42 U.S.C. (Supp. V) 7423(c) and 7479(4).

A source may rely on a general formula⁶ or, if it desires additional height, it may submit a physical demonstration of GEP height using fluid modeling techniques or field studies.⁷ The formula may be applied only to buildings, not terrain features,⁸ and only to "nearby" buildings—defined by the regulation as those within one-half mile of a stack. Those sources that wish to assess the effects of terrain features, or to obtain credit for a stack taller than formula height, must employ a physical demonstration. The demonstration must show that downwash, eddies, or wakes will cause "excessive" pollution concentrations, which EPA defined as an increase of 40% or more above prevailing concentrations.

Finally, a physical demonstration may consider not only pollution resulting from downwash, eddies and wakes, but also increased concentrations from a phenomenon known as "plume impaction," the accumulation of pollutants that occurs when a source's emissions run into a hill or mountainside. This aspect of the regulations allows a source located in mountainous terrain to lift its emissions plume over the mountains through use of a taller stack. Further-

⁶ The general formula uses the dimensions of a source to define GEP height as $1 + 1.5L$, where "L" equals the height or width of the building, whichever is greater. Sources constructed prior to EPA's 1979 proposal may use the traditional formula of two and one half times the height of a nearby building.

⁷ A fluid^{model} typically uses a small-scale model of an industrial facility placed in a wind tunnel. An investigator releases tracer gas from the model stack and then measures the effects on the stack's emission plume caused by surrounding buildings and terrain features. A field study relies on actual observations and measurements made at the facility.

⁸ Terrain features are often irregular in shape, and application of the formula is therefore impractical.

more, the regulations place no limitation on the obstacles that may be considered "nearby" in a demonstration, so long as the demonstration predicts excessive concentrations.

3. Respondents Sierra Club, the Natural Resources Defense Council, and others filed petitions for review of each significant provision in EPA's regulations. Petitioners here, which are utility companies, intervened in support of EPA's regulation. The court of appeals set aside significant portions of the agency's regulations, concluding that they failed to serve Congress's "predominant purpose" of reducing air pollution emissions (Pet. App. 18a), and remanded those aspects of the case to the agency. The court of appeals relied on the legislative history and, in particular, on the Conference Report accompanying the 1977 amendments, which states that "the Administrator's rule [on GEP height] should give 'credit' *only* for the height needed to avoid [downwash, eddies and wakes]." 123 Cong. Rec. 27071 (1977) (emphasis added). The court reasoned that Congress had thereby directed EPA to go beyond traditional engineering practice and to define GEP height so as to identify the minimum stack height needed to avoid localized pollution problems. See Pet. App. 10a, 20a-23a. The court also cited portions of the House Report discussing the failure of dispersion techniques, and tall stacks in particular, to reduce total emissions. See *id.* at 8a, 39a, citing H.R. Rep. 95-294, 95th Cong., 1st Sess. 84-86 (1977) (hereinafter House Report). The House Report noted that long-range dispersion of pollutants from tall stacks has been linked to "acid rain," and the court viewed this discussion as additional support for a strict interpretation of Section 123 (Pet. App. 8a, 39a).

The court accordingly rejected the EPA's interpretation of several key terms in the definition

of GEP stack height: "excessive" concentrations, "nearby" with respect to physical demonstrations, and the "plume impaction" rule. It also criticized EPA's decision to rely on generalized formulas in many instances, since it was not convinced that the formulas calculated the minimum stack height necessary to protect public health (see Pet. App. 44a). The court of appeals did uphold certain aspects of the regulations, including EPA's decision not to regulate flares—"pipe[s] used * * * to vent combustible gases by burning them at the top" (Pet. App. 47a-48a)—as stacks (*id.* at 47a-49a). The court left largely intact the "grandfather" provisions exempting older sources from the more stringent requirements of the final regulations (*id.* at 57a-66a), and it deferred to EPA's technical judgment that its general stack height formula adequately considered "plume rise," the natural buoyancy of emissions that causes them to rise above the height of a stack (*id.* at 31a-39a).

ARGUMENT

The decision below does not conflict with any decision of this Court or any other court. Furthermore, although we believe EPA's interpretation of various statutory terms in Section 123 was reasonable and should have been sustained by the court of appeals, the court's invalidation of the agency's interpretation does not present any legal issue of sufficient significance to warrant review by this Court.

1. We agree with petitioners (*e.g.*, Pet. 18-20) that courts should accord special weight to an agency's interpretation of technical terms in a statute it is charged with administering; it is settled law that a court may not disturb an agency's reasonable interpretation of a statute even when another view

may be equally reasonable. See, e.g., *INS v. Wang*, 450 U.S. 139, 144 (1981). But in this case the court of appeals did not clearly err in the legal standard of review it applied to EPA's interpretation of the Clean Air Act. Rather, the court applied an arguably correct legal standard but resolved most of the questions of statutory construction against the agency. Although we believe that the court of appeals could have (and should have) accepted EPA's definition of key technical terms in Section 123 of the Act, its rejection of EPA's interpretation stemmed not from its failure to accord the proper degree of deference, but from its conclusion that the legislative history and objectives of Section 123 compelled a different outcome.

2. a. While we, like petitioners, disagree with the court of appeals' construction of Section 123 in several respects, we do not believe that the court's errors were egregious or otherwise warrant this Court's review. Petitioners focus particular attention on the court of appeals' reversal of the "plume impaction" rule (see Pet. 22-26). As we noted, this rule provided that a source may obtain a greater GEP stack height based on a physical demonstration that additional height is necessary to raise emissions above a hill or mountain. In the absence of such additional stack height, a source would be required to control emissions in some other fashion, such as pollution control equipment.

The statute is silent on the question of plume impaction; EPA adopted the plume impaction rule because it believed that plume impaction is within the general category of air pollution problems that Congress was attempting to remedy in Section 123. In addition, EPA sought to avoid imposing

significantly more stringent emission controls on sources located in hilly terrain, a result that would discriminate on the basis of geographical location (see Pet. App. 38a). Petitioner asserts, as EPA did in the court of appeals, that Congress's failure to provide an explicit remedy for plume impaction was inadvertent and that EPA must be given the authority to supplement the regulatory scheme in this respect. The court of appeals itself noted that "there is much to commend [the plume impaction rule] from a policy perspective" (Pet. App. 38a), but it declined to allow EPA to augment the statutory scheme because there is legislative history suggesting that Congress may have been aware of the problem of plume impaction and that Congress's failure to act may have been deliberate (*id.* at 35a-36a). While we continue to believe that the legislative history is ambiguous on this issue and that EPA should have been allowed to fill the gap created by Congress, we cannot say that the court of appeals' contrary ruling was so clearly erroneous as to merit correction by this Court.⁹

b. Petitioners also contend (see Pet. 14-15, 18) that the court of appeals erred in invalidating the regulatory provisions defining "excessive" local pollution concentrations and GEP stack height in general.

As we noted, a facility may establish that a certain stack height is GEP height by showing through physical demonstrations that the height is necessary to avoid "excessive" local concentrations of pollutants. EPA's regulations define excessive concentrations as any increase of 40% or more above prevailing concentrations, regardless of how clean or dirty the ambient

⁹ We disagree with petitioners' suggestion (Pet. 24) that the court based its decision on erroneous factual assumptions. Whatever the merits of the court's holding, it is founded on a legal, not factual, analysis of the regulations.

air may be in a particular locality. The agency derived this definition from traditional engineering practice.

The court of appeals ruled, however, that an increase in local air pollution is not excessive and does not justify additional stack height unless it represents a threat to public health or welfare (Pet. App. 20a-24a). On this ground, the court also directed EPA to consider whether automatic application of the $1+1.5L$ formula (see pages 4-5 and note 6, *supra*) in all circumstances is consistent with its ruling on excessive concentrations (Pet. App. 44a). The court based this ruling on its conclusion that Congress's "predominant purpose" was not the codification of historical practice but the reduction of total air pollution. The court relied specifically on the House Report, which does provide some support for this view. See Pet. App. 21a (citing House Report 93).

This aspect of the court of appeals' opinion is certainly questionable, because the statute itself and other legislative history lend support to EPA's reliance on traditional engineering practice.¹⁰ Because the legislative history is ambiguous and EPA's interpretation of the statute is reasonable, the court of appeals should have upheld the agency. Nevertheless, we believe review by this Court is not necessary at this time because EPA has flexibility to explore other regulatory approaches. In setting aside the agency's action, the court "[did] not condemn the historical approach EPA has taken," and left open the opportu-

¹⁰ Section 123 itself arguably adopts the traditional "two and a half times" formula as a good estimate of the GEP height, and the House Report "affirms" that formula. House Report 93. The formula specified in the regulations is merely a refinement of this traditional formula.

nity for EPA to establish a formula for a stack height that is linked to public health hazards (Pet. App. 28a, 44a-45a). EPA may therefore adopt a generalized stack height formula on remand that will ease the regulatory burdens created by case-by-case demonstrations of GEP stack height.

c. Finally, petitioners object (Pet. 18) to the court of appeals' partial remand of EPA's definition of "nearby" obstacles. The House Report (at 93) states that Congress intended to eliminate consideration of downwash caused by objects more than "one-fourth to one-half mile" away. The court upheld EPA's one-half mile maximum for application of the general GEP formula, but directed the agency to adopt the same maximum for fluid models and field studies. EPA had placed no limitation on such demonstrations, reasoning that these more sophisticated techniques—which closely reproduce real-world conditions—obviate the need for an arbitrary distance limitation.

The lower court noted that "[w]hile [EPA's] approach might make a good deal of sense," Section 123(c) unequivocally applies the "nearby" limitation to both the formulas and physical demonstrations (Pet. App. 15a-16a). The court concluded that if EPA's approach were upheld, the term "nearby" would "effectively be read out of the statute" with regard to physical demonstrations of GEP height (*id.* at 15a n.3). The opinion also relied upon legislative history clarifying Congress's intent that the "nearby" limitation be strictly construed (*id.* at 13a-14a). In light of the statutory language and legislative history supporting the court's analysis, we cannot say that this aspect of the decision is an unreasonable application of this statutory provision. Nor does the court's

decision prevent EPA from devising an appropriate regulatory approach, because although the agency must adopt a distance limitation applicable to physical demonstrations, it retains considerable discretion in deciding precisely how to apply that limitation.

In sum, although we believe that certain aspects of the court of appeals' decision are incorrect, the court's interpretation of the statute is not unreasonable in all respects, and it left the EPA considerable discretion in implementing the court's mandate. Moreover, the court's narrow analysis of Section 123 is unlikely to have great precedential significance. We accordingly believe that there is no sufficient reason for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

JOHN A. BRYSON

CATHERINE A. COTTER

Attorneys

WILLIAM F. PEDERSEN

CHARLES S. CARTER

Attorneys

Environmental Protection Agency

MAY 1984